UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

OPINION NO. 467

Suffolk County Electrical Agency — Docket No. TX96-4-001

OPINION AND ORDER

Issued: February 17, 2004

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APPEARANCES

Christine C. Ryan, Michael N. McCarty, Shaun C. Mohler, Richard C. King, and Kathleen T. Spear on behalf of Suffolk County Electrical Agency

David P. Yaffe, Joseph B. Nelson, Revella L. Cook, Roni F. Epstein, and Stanley B. Klimberg on behalf of Long Island Power Authority

Jennifer L. Key on behalf of Southern California Edison Company

Diane Schratwieser, Janet Jones, and James R. Keegan on behalf of the Trial Staff of the Federal Energy Regulatory Commission

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Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

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I. Introduction

1. This Opinion and Order affirms in part, dismisses in part, and reverses in part an Initial Decision issued in this proceeding on March 12, 2003,[1] concerning the appropriate rates, terms, and conditions for Commission-directed transmission service under Section 211 of the Federal Power Act (FPA).[2] Specifically, this order accepts, with modification, Long Island Power Authority's (LIPA) proposed method for developing a charge for service to Suffolk County Electrical Agency (Suffolk) and makes certain other findings discussed below.[3] Because Suffolk does not currently purchase the power and has not identified any specific plans to purchase the power for which it sought the Section 211 transmission order, we are unable to issue a Final Order at this time.[4] Instead, Suffolk is directed to identify its supplier[s] within 90 days of the date of this order or we will dismiss this proceeding.

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[1] Suffolk County Electrical Agency, 102 FERC ¶ 63,037 (2003) (Initial Decision).

[2] 16 U.S.C. § 824j (2000).

[3] Suffolk is a municipal power agency created in 1983 by Suffolk County, New York. From its creation, Suffolk purchased hydropower from the New York Power Authority (NYPA), on an "as-available" basis, for resale to customers located within Suffolk County. This NYPA power was delivered to Suffolk's customers by Long Island Lighting Company (LILCO).

[4] For example, absent a specific request, it would be impossible for the Commission to find that a Final Order would satisfy the requirement of Section 211(b) that our order not "unreasonably impair the continued reliability of electric systems affected by the order." 16 U.S.C. § 824j(b) (2000).

II. Background

2. On January 17, 1996, Suffolk applied to the Commission for an order, pursuant to Sections 211 and 212[5] of the FPA, directing LILCO, now LIPA,[6] to provide transmission services, as well as certain ancillary, billing, and collection services, to allow Suffolk to purchase lower-cost power for resale to residential, commercial, and industrial customers.[7] LIPA responded that Suffolk's request: (1) was a request for prohibited retail wheeling and/or a sham wholesale transaction; (2) was not in the public interest; and (3) threatened the reliability of LIPA's transmission and distribution system.

3. On December 31, 1996, the Commission issued a Proposed Order directing LIPA to provide transmission service to the extent necessary to accommodate Suffolk's proposed purchase and resale of power, and ordered further procedures to establish the rates, terms, and conditions of such service.[8] At the repeated requests of the parties, however,[9] the Commission deferred further action.

4. On September 27, 2001, the Commission issued an order setting this case for hearing, first allowing the parties another opportunity to negotiate a settlement.[10] The parties were still unable to reach agreement,[11] so a hearing was held to determine the rates,

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[5] 16 U.S.C. ' 824k (2000).

[6] Long Island Power Authority (Authority), a municipal subdivision of the State of New York, was created under the Long Island Power Act of 1986, N.Y. Pub. Auth. Law '' 1020 et seq., to acquire LILCO's securities and assets. A second Long Island Power Authority (LIPA), a wholly owned subsidiary of the Authority, acquired LILCO's transmission and distribution system in June 1998. On May 26, 1998, LIPA filed a notice of succession. For convenience, we will refer to LILCO, the Authority, and LIPA collectively as LIPA.

[7] At that time, Suffolk expected to purchase power from Northeast Utilities and Enron Power Marketing, Inc.

[8] Suffolk County Electrical Agency, 77 FERC & 61,355 (1996).

[9] E.g., March 11, 1997, May 9, 1997, July 9, 1997, May 26, 1998, and September 2, 1998.

[10] Suffolk County Electrical Agency, 96 FERC & 61,349 (2001) (Hearing Order).

[11] On April 12, 2002, LIPA filed a motion to dismiss this case. The Commission denied the motion on July 23, 2002. Suffolk County Electrical Agency, 100 FERC & 61,091 (2002).

terms, and conditions for transmission over facilities that might otherwise be characterized as distribution facilities, and resolve charges for certain ancillary, billing, and collection services.[12]

III. Initial Decision

5. The Initial Decision addressed these issues, and also both determined that the issue of unbundling LIPA's Retail Services Tariff was beyond the scope of this proceeding,[13] and rejected certain jurisdictional issues raised by LIPA.[14]

6. Commission Trial Staff (Trial Staff), Suffolk, and LIPA each filed a timely Brief on Exceptions and a timely Brief Opposing Exceptions.

IV. Discussion

A. Commission Jurisdiction

7. LIPA argues that, to the extent that the Initial Decision is intended to constitute a review of the justness and reasonableness of LIPA's retail rates (i.e., LIPA's Retail Services Tariff, SC1-SCEA (Suffolk)), such review is outside the Commission's jurisdiction and therefore is in error.

8. Suffolk disagrees, arguing that, if the Commission does not address rate issues in this proceeding, LIPA, under what would then be an unregulated tariff, would be able to avoid the Commission's authority under Sections 211 and 212 to set reasonable rates, terms, and conditions.

9. LIPA misunderstands the extent of Commission jurisdiction in a Section 211 case. As the Presiding Judge correctly pointed out, the Commission has determined that "we may order transmission services under Section 211 even when they involve the use of 'local distribution' and 'generation' facilities that are otherwise non-jurisdictional."[15] And

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[12] Id. at Ordering Paragraph (C). Two other issues set for hearing in the Hearing Order are no longer in dispute: concerns regarding back-up power, see Exh. SUF-6 at 30, Exh. LIPA-1 at 23-24 (revised), and Exh. S-4 at 8-9; and the necessity for implementation studies, see Initial Decision at P 107.

[13] Initial Decision at P 106.

[14] Id. at P 111.

[15] Id. at P 73 & n.51, citing Tex-La Electric Cooperative of Texas, Inc., 67 FERC ¶ 61,019 at 61,056 (1994).

Section 212(a) of the FPA explicitly directs that "rates, charges, terms, and conditions [for Commission-directed transmission service under Section 211] shall promote the economically efficient transmission and generation of electricity and shall be just and reasonable, and not unduly discriminatory or preferential."[16] The Commission thus is obligated by Section 212(a) to evaluate LIPA's rates at issue here to determine if they are, for this service, just and reasonable. That LIPA has turned to its retail rates to develop its proposed rates at issue here does not insulate the proposed rates from Commission review. Likewise, a Commission determination on the proposed rates at issue here does not constitute second-guessing retail rates. In sum, all that we are doing is what we are authorized to do: evaluate under Section 212 what the appropriate rate should be for jurisdictional service under Section 211.

B. Charge for Service to Suffolk

10. The Presiding Judge accepted LIPA's proposal to use LIPA's Retail Services Tariff as the appropriate starting point for the rates LIPA charges Suffolk. On exceptions, Suffolk argues that there are fatal flaws in the scope and structure of LIPA's Retail Services Tariff. Specifically, Suffolk argues, in relevant part, that the tariff is based on LIPA's 1998 costs and bears little relation to its 2001 (test-year) cost of service.

11. Suffolk is correct that it is inappropriate to rely on the 1998 data contained in LIPA's Retail Services Tariff because it is stale. Rather, we agree with Suffolk that the rate should rely on 2001 data, contained in LIPA's Exhibit No. 15 and Suffolk's Exhibit No. 7. Using this data, as done in LIPA's Exhibit No. 15, results in a rate of $0.0386/kWh. [17]

C. Acquisition Adjustment

12. The acquisition adjustment -- the cost the Authority paid to acquire LILCO, less the original book value of LILCO's assets, less accumulated depreciation -- essentially allows LIPA to recover the write-off of the Shoreham Nuclear Generating Plant (Shoreham), as well as elimination of deferred federal income taxes held by LILCO at the time of the acquisition, under a settlement with the State. LIPA explained that, as a result of the acquisition, its rates for residential customers were reduced an average of 20 percent. The Presiding Judge found that LIPA could properly recover the full $194 million as a separate surcharge in the distribution rate, given that the acquisition adjustment was part of the LILCO purchase price.[18]

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[16] 16 U.S.C. § 824k(a) (2000).

[17] This rate includes an acquisition adjustment component of $0.0167/kWh.

[18] Initial Decision at P 31-37.

13. On exceptions, Suffolk argues that this determination improperly charges to distribution rates the costs of a cancelled generation plant. Suffolk also asserts that the Initial Decision and LIPA "inaccurately declare the Shoreham regulatory asset to have been 'eliminated,'" whereas "they have been renamed and embedded in LIPA's books as a stranded cost."[19] In this regard, Suffolk asserts that the Presiding Judge ignores the stranded cost requirement that LIPA prove that it had a reasonable expectation of continuing to serve Suffolk's customers. Moreover, Suffolk argues that, even considered strictly as an acquisition adjustment, LIPA failed to show the costs to be prudent. Finally, Suffolk maintains that, to the extent the Commission allows recovery of the acquisition adjustment, it should be spread to all functions (i.e., also production and transmission), not just distribution.

14. In reply, Trial Staff and LIPA argue that, in fact, stranded costs are not at issue. Trial Staff says this is because LIPA's board of trustees, which Trial Staff argues has sole authority over LIPA's retail rates, has approved inclusion of the acquisition adjustment. Trial Staff also agrees with LIPA's argument that the acquisition adjustment is an embedded cost of LIPA's transmission and distribution system and that, because Suffolk will be a customer utilizing that system, Suffolk must pay this cost. Both also point out that the Commission approved the disposition of LILCO's facilities.[20] They further argue that it is appropriate to assign these costs to retail customers, as it is retail customers who received an average 20 percent rate reduction because of the LILCO facilities' disposition.

15. We will affirm the Presiding Judge on this issue. Having reviewed the record, the Initial Decision, and the parties' briefs, we reject Suffolk's argument that a stranded cost recovery test is required in this proceeding. As noted above, LIPA purchased LILCO and acquired its assets and liabilities, including the costs associated with decommissioning and disassembling Shoreham, under a settlement with the State of New York. Suffolk's retail customers, like other retail customers of LILCO's, benefited from that settlement in the form of lower rates. Therefore, it is appropriate that Suffolk continue to pay for the acquisition adjustment.

D. Rate for Local Installed Capacity

16. The Presiding Judge found that the charges developed by LIPA for local installed capacity (from its LIPA's Retail Services Tariff, SC1-SCEA (Suffolk)), which are similar to the charges associated with LIPA's retail choice program (LI Choice), appear reasonable.

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[19] Suffolk Brief on Exceptions at 21.

[20] See Long Island Power Company, 82 FERC & 61,129 at 61,461 (1993).

Thus, the Presiding Judge found that, if Suffolk chooses LIPA as an installed capacity provider, charges may be at LIPA Retail Services Tariff rate.[21]

17. On exceptions, Suffolk argues that LIPA's rate for local installed capacity should be unbundled. Suffolk maintains that, with the exception of certain rate riders, the LIPA Retail Services Tariff does not "'develop' or identify any specific charges; it is an amalgam of all of the costs that comprise LIPA's system-wide revenue requirement." As a result, Suffolk argues, it is impossible to determine, as the Presiding Judge did, that such a rate appears reasonable. Suffolk also argues that, as the Commission has acknowledged, the nature of the service sought by Suffolk is different from the service offered under the LI Choice program, so the fact that the charge is comparable is insufficient.[22]

18. Trial Staff and LIPA disagree. Trial Staff argues that Suffolk did not refute LIPA's assertions that the provision of local capacity for Suffolk's retail customers is a matter outside of this proceeding and the Commission's jurisdiction or that the SCI-SCEA (Suffolk) rates reflect LIPA's current costs. LIPA argues that the proposed unbundling is beyond the Commission's jurisdiction because local installed capacity is not related to wholesale transmission service. LIPA also maintains that Suffolk seeks to impose a rate for local installed capacity that will under-recover LIPA's costs.

19. As discussed above, we reject Trial Staff and LIPA's argument that these rates are outside the Commission's jurisdiction. While Suffolk ultimately will need to pay for local installed capacity, to the extent it is a load serving entity, Suffolk has no obligation to choose LIPA as the local installed capacity provider. Unless and until Suffolk chooses LIPA as the provider, LIPA may not include a local installed capacity charge in the rate it charges Suffolk.

E. Fuel and Purchased Power Cost Adjustment Rider

20. LIPA proposed a rate rider, the Fuel and Purchased Power Cost Adjustment (FPPCA), to recover costs it incurs not otherwise recovered in its rates; the FPPCA is based on the deferred costs of fuel and purchased power incurred in the prior calendar year in excess of the costs recovered through the base rates. LIPA explained that the Authority previously approved such a rider for Long Island's retail rates, that it recovers costs otherwise not recovered in LIPA's retail rates, and also maintained that the costs it seeks to recover are retail costs and are beyond the Commission's jurisdiction. The Presiding Judge agreed that the question of whether LIPA should be allowed to recover the FPPCA from

[21] See id. at P 47-48.

[22] Suffolk also argues that "it is precisely because of the residual baggage lumped into the LI Choice tariff that the program has failed to attract participation or produce savings for consumers." Suffolk Brief on Exceptions at 38.

Suffolk and ultimately Suffolk's retail customers is a retail matter to be dealt with in a state proceeding.[23]

21. Suffolk argues that the Commission should assert preemptive jurisdiction on the FPPCA issue, and direct LIPA to require that the adjustment reflect cost-causation principles, and not be in effect indefinitely (though Suffolk does not dispute that some charge is appropriate). In support, Suffolk points out that LIPA's own witness testified that "there will come a time when the energy provided by Suffolk will not longer contribute to the deferred balances contained in the FPPCA. At that point, it would seem reasonable that Suffolk-enrolled customers would not be responsible for the energy component of the FPPCA."[24]

22. We will reverse the Presiding Judge on this issue. For the reasons discussed above, we conclude that we have authority to review the proposed rider. Pursuant to Sections 211 and 212, the Commission has jurisdiction over charges for service that it orders, even if there was a prior state-approved retail rate rider that was charged to retail customers; we are not second-guessing the retail rate rider and the reasonableness of retail rates, but determining the appropriate rate to be charged for Commission-jurisdictional service.

23. Here, Suffolk does not object to paying the FPPCA, but to paying it for some extended period. And even LIPA acknowledges that the "record also includes testimony explaining that LIPA anticipates that adjustments to the FPPCA will need to be made to reflect the fact that certain energy-related costs will no longer be incurred by LIPA on their behalf."[25] Accordingly, we will adopt the first (of three) suggestion proposed by LIPA's witness Mr. Little, i.e., "to have each participating customer pay the full FPPCA for [just] twelve months following their date of enrollment." As Mr. Little explained, this proposal would "match the cost causality inherent in the deferred fuel cost recovery mechanism."[26]

F. Billing Services

[23]Initial Decision at P 56.

[24]Suffolk Brief on Exceptions at 50, citing testimony by Mr. Little in Exh. LIPA-6 at 24:22-26.

[25]LIPA Brief Opposing Exceptions at 38 (citations omitted).

[26]Exh. LIPA-6 at 25:4-13.

24. The Presiding Judge found that the Commission determined, in the Proposed Order, that LIPA is to perform billing services for Suffolk's energy purchases.[27]

25. On exceptions, LIPA argues that this is erroneous. First, LIPA maintains that Sections 211 and 212 of the FPA only address the rates, terms, and conditions of LIPA's transmission service, not Suffolk's separate sale of energy to its end-use customers. Second, LIPA points out that, for the LI Choice customers, it bills each residential customer for transmission service, yet LIPA does not provide billing for the energy commodity costs. Next, LIPA argues that the Presiding Judge erred in relying on a purported agency relationship (with LILCO) under an expired Suffolk/LILCO agreement, and one that did not entail the provision of billing services.[28] Finally, LIPA asserts that a pass-through billing requirement for recovery of Suffolk's energy purchases is inconsistent with the scope of LIPA's authority under New York law and is against the public interest.

26. Trial Staff and Suffolk disagree. First, Suffolk argues that the Commission should reject LIPA's argument on procedural grounds; LIPA is collaterally attacking the Proposed Order and Hearing Order. Suffolk also argues that the Commission and the Presiding Judge correctly interpreted the FPA, and that LIPA mischaracterizes the Suffolk/LIPA contract, which provided that "LILCO, as delivery agent of [Suffolk], shall be responsible for all billing and collection functions for NYPA Hydropower Delivered to Residential Customers."[29] Finally, Suffolk argues that LIPA's provision of billing and

[27]Initial Decision at P 74.

[28]Rather than acting as billing agent for the NYPA service, LIPA states, LILCO computed its fuel costs savings resulting from the substitution of NYPA energy and reflected those savings in bills.

[29]Suffolk also points out that the contract further provided:

> LILCO shall, within twenty (20) calendar days of billing Residential Consumers, forward to [Suffolk] funds equal to the amount billed to Residential Consumers . . . after deducting (a) LILCO's fees . . . and (b) any additional costs LILCO incurs as a result of this Agreement, subject to the provisions of the Agreement.

collection services for Suffolk is authorized under LIPA's enabling statute, and is in the public interest.

27. Upon consideration, we no longer believe it appropriate to require LIPA to provide these billing services. At the time we issued the Proposed Order, LILCO was transmitting power from NYPA to Suffolk's customers, and providing the associated billing services. However, that transmission service has now terminated,[30] so LIPA is no longer able to seamlessly offer such billing services for Suffolk's customers. In these circumstances, we decline to require the transmission provider of a wholesale purchase to provide billing services for the retail customers of that wholesale purchase. Therefore, Suffolk, like any other load-serving entity, should now have to provide its own retail billing to its own retail customers. Accordingly, we will dismiss this portion of the Initial Decision.

28. Moreover, in light of this determination, we will also dismiss as moot those portions of the Initial Decision which discussed the issues of Individual Customer Enrollment[31] and Constant Load Methodology. [32]

G. Recovery of Incremental Costs

29. The Presiding Judge approved LIPA's proposal that Suffolk be required to pay for the estimated incremental costs for start-up, distribution, billing, and collection services, subject to a final true-up to actual expenditures, finding that LIPA's Transmission Service Agreement contains sufficient specificity and procedural protections. The Presiding Judge determined that any disputes regarding the final true-up should be decided by the Commission.[33]

30. We will dismiss this portion of the Initial Decision. Most of the enumerated costs[34] have been eliminated by our determination that LIPA is not required to provide billing

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[30] See Trial Staff Brief Opposing Exceptions at 41; LIPA Brief Opposing Exceptions at 13.

[31] See Initial Decision at P 79-81 & n.57.

[32] See id. at P 92.

[33] Id. at P 52.

[34] See id. at P 50 n.37.

services. Any remaining costs would be recovered through other portions of LIPA's rates, and, to the extent those rates are not adequate, LIPA can propose to revise them to ensure full cost recovery.

The Commission orders:

(A) The Initial Decision is hereby affirmed in part, dismissed in part, and reversed in part, as discussed in the body of this Opinion and Order.

(B) Suffolk is hereby directed to identify to the Commission, within 90 days of the issuance of this Opinion and Order, the supplier or suppliers from whom it intends to purchase power, along with the amount of power it intends to purchase.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.